No. 71 – 962

FILED
MAR 14 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1971

MUNICIPAL LIGHT BOARDS OF READING AND WAKEFIELD, MASSACHUSETTS,

Petitioners,

v.

FEDERAL POWER COMMISSION, BOSTON EDISON COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

GEORGE SPIEGEL
2600 Virginia Avenue, N. W.
Washington, D. C. 20037

MELVIN RICHTER
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorneys for Petitioners

March, 1972

BEACON PRINTING COMPANY — WASHINGTON, D.C. — 293-7160

IN THE

Supreme Court of the United States

October Term 1971

No. 71-902

MUNICIPAL LIGHT BOARDS OF READING AND WAKEFIELD, MASSACHUSETTS,
Petitioners,

v.

FEDERAL POWER COMMISSION,
BOSTON EDISON COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

Neither of the Respondents takes issue with the importance of the question presented in this proceeding. Rather, both seek to create the impression that the resolution of the question by the court below was sound and in accordance with the applicable precedents. However, while Respondents advance various arguments allegedly supporting that conclusion, we show below, as indeed we have already shown in large part in our Petition, that Respondents' arguments are themselves invalid and their conclusion unsound.

1. Unlike the court below (Pet. App. 13-16) and Respondent Boston Edison Company (Br. in Opp., p. 4), Respondent Federal Power Commission (Br. in Opp., p. 4) recognizes that the *Arrow* case[1] is not controlling on the question here presented. However, the Commission tries to derive as much comfort as possible from *Arrow* by asserting (Br. in Opp., p. 4) that the absence of judicial review with respect to its one-day suspension of the Edison rate increase is nevertheless "strongly suggested" by this Court's decision in that case. But whether or not, as the Commission goes on to argue, *Arrow* should, therefore, be extended to the instant situation is a question which properly should be decided only after briefing on the merits.

This is particularly so since not only did this Court go out of its way in *Arrow* expressly to note that its holding would not necessarily apply under other statutes such as the Federal Power Act here involved (372 U.S. at 666, fn. 13), but the question before the Court there was very different, i.e., the existence of *original* jurisdiction in the district courts to suspend the effectiveness of a proposed rate change *beyond* the period provided in the Interstate Commerce Act. The Court's holding that the district court lacked such jurisdiction obviously should not be dispositive of the question here, i.e., the jurisdiction of the Court to *review* for abuse of discretion, under the usual statutory review provisions, an agency refusal to suspend a proposed rate, all *within* the period authorized by the controlling statute. In this connection, it should be also noted that this Court expressly took into account the fact that the action before it did not involve review jurisdiction by commenting (372 U.S. at 671) that the contrary procedure

> "* * * would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges reviewing the Commission's completed task (fn. omitted)."

---

[1] *Arrow Transportation Co. v. Southern Railway Co.*, 372 U.S. 658 (1963).

Judicial review of Commission action with regard to suspension of rates under Section 205(e) would no more interfere with "the timing of rate changes" (Comm. Br. in Opp., p. 5) than does court review of the rate changes themselves. As this Court recognized in *Arrow*, the jurisdiction of the courts under the typical judicial review provisions extends to agency rate determinations (372 U.S. at 670-671; see also e.g., *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)), and, of course, the courts also have the authority, as an incident to such judicial review, to stay the effectiveness of the rate order involved. Cf. *F.P.C. v. Interstate Natural Gas Co.*, 336 U.S. 577 (1949). To be sure, the scope of the review of such matters is narrow and limited to questions of law, but abuse of discretion has long been treated as error of law for those purposes. See e.g., Administrative Procedure Act, 5 U.S.C. 706.[2]

2. Nor is there any merit in the further argument of both the Commission (Br. in Opp., p. 6) and Edison (Br. in Opp. pp., 7-8) that the Commission's order here involved does not constitute "final agency action" ripe for judicial review. While it is, of course, true that the order is not "final" in the sense that its issuance came at the conclusion of the proceeding, such a requirement has long been discarded as far as judicial review is concerned. Under the more modern thinking, orders shy of the order issued at the conclusion of the proceeding are subject to judicial review if their effect nevertheless is finally to determine rights of the parties with regard to the particular matters involved. See, e.g., *Phillips Petroleum Co. v. F.P.C.*, 227 F.2d 470 (10th Cir., 1955), *cert. denied, sub nom. Michigan Wisconsin Pipe Line Co. v. Phillips Petroleum Co.*, 350 U.S. 1005 (1956); *EFD v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir., 1970); *Greene County Planning Board v. F.P.C.*, 2d Cir. No. 71-1991 (issued January 17, 1972), pp. 1418-1419. As stated in *EFD v. Hardin, supra*, in holding subject to review the Agriculture Secretary's failure to suspend the required registration of a pesticide pending completion of the permanent cancellation proceedings (428 F.2d at 1098):

---

[2] If *Arrow* were in fact applicable, it would preclude review of Commission suspension orders generally and not limit non-reviewability to abuse of discretion, as the court below would have it (Pet. App. 18).

> "The doctrine of ripeness and finality are designed to prevent premature judicial intervention in the administrative process, before the administrative action has been fully considered, and before the legal dispute has been brought into focus [fn. omitted]. No subsequent action can sharpen the controversy arising from a decision by the Secretary that the evidence submitted by petitioners does not compel suspension or cancellation of the registration of DDT."

So here, also, no subsequent action by the Commission can sharpen the controversy with regard to the propriety of not continuing the pre-filing rates in effect during the five-month suspension period provided in Section 205(e). As pointed out in our Petition (at pp. 9-10), the effect of the Commission's refusal to suspend Edison's new rates for the full five months is finally to determine that Edison need not charge the pre-filing rates during that period. Since that Commission action would be unaffected by the subsequent Commission proceedings involving the validity of Edison's rate proposal generally, the Commission's order here involved plainly constitutes "final agency action" with regard to the proper rates during the five-month statutory period and as such is reviewable under judicial review provisions contained in Section 313(b).[3]

3. Edison's further argument (Br. in Opp., pp. 11-13) that the Act gives the Commission unbridled discretion whether or not to suspend a rate filing distorts the statutory scheme. As pointed out in our Petition (at pp. 11-13), the pertinent statutory language clearly envisions that absent exceptional circumstances, new rates are to be suspended for the full five-month period provided unless the case is decided earlier - a reading which is fully supported by the legislative history of the suspen-

---

[3] *Humble Oil & Refining Co. v. F.P.C.*, 236 F.2d 819 (5th Cir. 1956), *cert. denied*, 352 U.S. 967 (1957) and its companion, *Hunt Oil Co. v. F.P.C.*, 236 F.2d 828 (5th Cir. 1956), *cert. denied* 352 U.S. 970 (1957), cited by the Commission (Br. in Opp., p. 6) are distinguishable. In these cases, the companies went far beyond the matters finally determined by the suspension order and sought to raise questions attacking the validity of the basic proceedings.

sion provision contained in Section 15(7) of the Interstate Commerce Act (49 U.S.C. 15(7)), from which Section 205(e) was derived. See *Hope Natural Gas Co. v. F.P.C.*, 196 F.2d 803, 806-807 (4th Cir. 1952).

In other words, in line with the Federal Power Act's long recognized objective to protect the consumers against excessive rates (see, e.g., *Hunt Oil Co. v. F.P.C.*, 398 F.2d 746, 750 (5th Cir. 1968) "Congress intended [by the suspension provisions] to protect consumers from increased rates until the Commission would fix just and reasonable rates but it considered that a period of five months would be the maximum time permitted." *Hunt Oil Co. v. F.P.C., supra*, at 750; see also *Hope Natural Gas Co. v. F.P.C., supra*, at pp. 806-808; *Phillips Petroleum Co. v. F.P.C., supra* at p. 474.[4]

[4]Edison's assertion (Br. in Opp., pp. 6-7) that Petitioners seek reversal of the one-day suspension order on the basis of Petitioners' factual allegations misstates Petitioners' position. As noted in our Petition (at p. 6), it is our position that, read in light of the statutory history and the Commission's own gloss, Section 205(e) requires the Commission to suspend major rate filings for the full statutory period in the absence of exceptional circumstances. Not only has the Commission made no finding of exceptional circumstances in this case, but the findings which it did make and on which it based its suspension of only one day (Pet. App., pp. 34-35) are indistinguishable from the findings customarily made in connection with full five-month suspensions.

WHEREFORE, for the foregoing reasons together with those set out in the Petition herein, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE SPIEGEL
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

MELVIN RICHTER
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Petitioners

March, 1972